

REMARKS

This amendment is responsive to the non-final Office Action of August 19, 2009. Reconsideration and allowance of claims 2, 4, 6-14, 16, 17, and 19-25 are requested.

The Office Action

Claims 2, 4, 6-12, and 23-25 stand rejected under 35 U.S.C. § 101 on the grounds that apparatus claim 11 somehow also claims a method.

Claims 13, 14, 16, 17, 19-23, and 25 stand rejected under 35 U.S.C. § 112, first paragraph.

Claim 24 stands rejected under 35 U.S.C. § 112, second paragraph.

Claims 3, 4, 6-13, 16, and 19-25 stand rejected under 35 U.S.C. § 102 over Mortara (US 5,704,351).

Claims 2, 14, and 17 stand rejected under 35 U.S.C. § 103 over Mortara in view of Schwarzberg (US 5,730,143).

Request for Refund

At the bottom of page 8, the Examiner acknowledges that the Office Action of December 4, 2008 was mistakenly sent as a Final Rejection and that upon review of the previous Action and the Applicant's remarks [of April 29, 2009], the Finality of the previous [December 4, 2008] Action has been withdrawn.

First, it is submitted that the previous Action and the Applicant's remarks should have been reviewed prior to the issuance of the Advisory Action of May 7, 2009.

Second, a Request for Continuing Examination and \$810 fee were paid based on the Examiner's refusal to withdraw the Finality of the Office Action of December 4, 2008, which Finality the Examiner now acknowledges was mistaken. Because the payment of the \$810 RCE fee was predicated on the Examiner's mistake, it is submitted that the Applicant is entitled to a refund of the \$810 RCE fee.

The Applicant hereby requests that the \$810 RCE fee which was paid on May 29, 2009 be refunded to the Applicant's Deposit Account No. 14-1270.

35 U.S.C. § 101

First, the Examiner's assertion that apparatus claim 11 positively recites a method and an apparatus is traversed. Nonetheless, claim 11 has been reformatted to mimic the format of claim 13, which the Examiner appears to have found acceptable under 35 U.S.C. § 101.

It might be noted that the format of claim 11 resulted when dependent claim 11 was placed in independent form and claim 11 was simply concatenated to simplify distinguishing between substantive amendment and amendment in form.

Moreover, "wherein" is commonly used in dependent claims when further limiting an element set forth in a parent claim. Such dependent claims are not properly interpreted as intended use. It is asserted that "wherein" may not be properly interpreted as intended use.

35 U.S.C. § 112

Claim 13 has been amended to add the missing word "signal".

Regarding claim 20, in the embodiment in which the signaling is performed by LEDs or speakers on the portable measuring apparatus 12, 14, the signaling is clearly perceived locally.

Regarding claim 23, the present application discloses at least two embodiments. As set forth on page 2, lines 32-34, the quality evaluation of the measuring signal is automatic. As set forth on page 3, lines 1-4, such automatic signaling can be in response to the sensors being placed on a patient or moved to another measuring site on the patient. Alternately, as set forth on page 3, lines 5-8, the measuring apparatus can monitor the quality of the measuring signal and signal if a change in the quality of the measuring signal is detected. Monitoring for a change in the quality of the measuring signal must be done when a measuring signal is being generated, such as during normal patient monitoring operations. Claim 23 has been amended to parallel page 3, lines 5-8 and claim 8 as originally filed, more closely.

Claim 25 has been amended to parallel page 3, lines 17-20 more closely. The concept of evaluating the quality of the measuring signals being based on an evaluation of the interference level also finds antecedent basis in claim 11 as originally filed.

Regarding claim 24, it is submitted that the Examiner is confusing broad with indefinite. The Applicant has claimed evaluating a signal form throughout the prosecution of the present application (note claim 11 as originally filed) without any objection from the Examiner. In fact, the Examiner proposes two specific definitions of the term “form” in the rejection. Such concrete definitions support the Applicant’s position that the term “form” has definite meaning to those of ordinary skill in the art. For example, cardiac signals have a distinctive wave form, portions of which are typically denoted as the R, S, and T-portions of the cardiac signal. A deviation from the characteristic form, whether the wave becomes a square wave, becomes noisy, or for other reasons, still indicates a decline in the quality of the signal. Accordingly, it is submitted that “form” is definite and its meaning ascertainable in the context of the present application.

35 U.S.C. § 102

Claim 11 calls for the mobile measuring apparatus to evaluate the physiological data measurement signal. By contrast, Mortara at column 5, lines 9-17 measures the impedance of the electrical connection of the electrode to the patient. Mortara does not indicate that the impedance is measured by evaluating the cardiac signal. Indeed, impedance is normally measured based on the well-known electrical equation: $V/I=R$. In practice, this is typically implemented by placing a known voltage across the unknown impedance and measuring the current flow or putting a known current through the unknown impedance and measuring the voltage. Either way, such an electrode check would be performed using a test impedance checking signal and not the cardiac signals themselves. Indeed, as set forth in column 10, lines 26-55, Mortara uses the second of these techniques. Specifically, Mortara pulses current sources 228, 230 and measures the voltage. Thus, in Mortara, the signal quality is not measured by evaluating a quality of the physiological data measurement signal.

Accordingly, it is submitted that claim 11 and claims 2, 4, 6-10 and 23-25 are not anticipated by Mortara.

Claim 13 calls for a measuring apparatus that evaluates the measured physiological patient data signal to determine a quality of said signal. By contrast,

Mortara applies a known current across the electrode/patient interconnection and measures a resultant voltage in order to determine the connection impedance.

Accordingly, it is submitted that claim 13 and claims 14 and 22 dependent therefrom are not anticipated by Mortara.

Claim 16 calls for a means of determining a quality of the measured medical data signals from such measured medical data signals. By contrast, Mortara measures electrode/patient interconnection impedance using a known current source which generates a current pulse across the interconnection and measures voltage across the interconnection during the applied impedance test current pulse.

Accordingly, claim 16 and claims 17 and 19-21 dependent therefrom are not anticipated by Mortara.

35 U.S.C. § 103

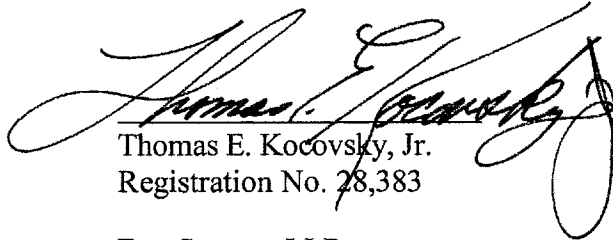
Schwarzberg was not applied as and does not cure the above-noted shortcomings of Mortara. Accordingly, it is submitted that claims 2, 14, and 17 distinguish patentably over the references of record.

CONCLUSION

For the reasons set forth above, it is submitted that claim 2, 4, 6-14, 16, 17, and 19-25 are not anticipated by and distinguish patentably over the references of record and meet the other statutory requirements. An early allowance of all claims is requested.

In the event the Examiner considers personal contact advantageous to the disposition of this case, the Examiner is requested to telephone Thomas Kocovsky at 216.363.9000.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas E. Kocovsky, Jr.", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Thomas E. Kocovsky, Jr.
Registration No. 28,383

FAY SHARPE LLP
The Halle Building, 5th Floor
1228 Euclid Avenue
Cleveland, OH 44115-1843
Telephone: (216) 363-9000 (main)
Telephone: (216) 363-9122 (direct)
Facsimile: (216) 363-9001
E-Mail: tkocovsky@faysharpe.com